

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA68/2024
[2024] NZCA 570

BETWEEN YONG SHENG BEI
Appellant
AND B & Z TRADES COMPANY LIMITED
Respondent

Hearing: 7 October 2024
Court: Hinton, Brewer and Osborne JJ
Counsel: Appellant in person
E St John and D L C Liu for Respondent
Judgment: 7 November 2024 at 12 pm

JUDGMENT OF THE COURT

- A The application for leave to adduce further evidence is declined.**
B The appeal is dismissed.
C Costs are awarded to the respondent for a standard appeal on a band A basis and usual disbursements. We certify for second counsel and allow .5 costs for the respondent's role in preparing the case on appeal.
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REASONS OF THE COURT

(Given by Hinton J)

[1] By judgment dated 31 January 2024, Associate Judge Gardiner declined an application that three caveats lodged by the appellant, Yong Sheng Bei (YSB), not lapse.¹ YSB appeals.

[2] YSB is the father of Yaoping Bei (YB). YSB claims that between 2005 and 2021, he and YB were equal partners in a car importation business run through the respondent company, B & Z Trades Company Ltd (B & Z). YSB says B & Z was effectively holding its assets on trust for the partnership and on that basis he has a caveatable interest in properties registered in the company's name.

[3] To sustain a caveat the caveator needs to show a reasonably arguable case for an interest in land.² Disputes as to fact will generally be resolved in the caveator's favour, though not unquestionably.³ Where the burden is discharged, the court retains a residual discretion to remove the caveat, which requires the court to be satisfied that removal would not prejudice the caveator's legitimate interest.⁴

[4] YSB issued substantive proceedings in October 2023, after the caveat application hearing. The pleading is similar to that relied on for the caveat application, that is that the company's assets are held on trust for a partnership. The statement of claim contains two causes of action: first, that YB breached his fiduciary duty to provide for YSB, and secondly, that B & Z breached its fiduciary duty as a constructive trustee for the partnership by failing to disgorge the assets upon the dissolution of the partnership and by failing to provide for YSB.

[5] In September 2024 YSB discontinued his legal representation. He represented himself at this hearing. We permitted his younger son Jordan Bei (YB's stepbrother) to speak on his behalf as YSB would have had to speak through an interpreter. YSB nonetheless arranged to have an interpreter present to assist him in court.

¹ *Bei v B & Z Trades Co Ltd* [2024] NZHC 20 [judgment under appeal].

² *Castle Hill Run Ltd v NZI Finance Ltd* [1985] 2 NZLR 104 (CA) at 106; *Sims v Lowe* [1988] 1 NZLR 656 (CA) at 660; *Botany Land Development Ltd v Auckland Council* [2014] NZCA 61, (2014) 14 NZCPR 813 at [24]; and *Philpott v Noble Investments Ltd* [2015] NZCA 342 at [26].

³ *Bethell v Rickard* [2013] NZCA 68 at [22].

⁴ *Pacific Homes Limited (in rec) v Consolidated Joineries Ltd* [1996] 2 NZLR 652 (CA) at 656; and *Philpott v Noble Investments Ltd*, above n 2, at [26(d)], citing *Stewart v Kaipara Consultants Ltd* [2000] 3 NZLR 55 (CA) at [23].

Background

[6] YSB came to Auckland from China and purchased a property in Great South Road, Ōtāhuhu in the 1990s. He and his wife, Yan Xian Zhong (YXZ), lived on the second floor and ran a shop on the ground floor. The shop sold clothes and general goods imported from China and provided tailoring and other services. YSB returned to China in around 2000 due to visa issues. YSB's sister, Hui Ming Bei, who provided affidavit evidence in support of his application, incorporated B & Z in May 2000 and ran the shop through that company. Hui Ming was the sole shareholder and director, but she and YSB say she held the shares on his behalf until he could return to New Zealand. Hui Ming says B & Z stands for the last names of YSB and his wife, YXZ.

[7] In October 2000 YSB was granted a permanent resident visa allowing him to return to New Zealand. His (and his sister's) evidence was that she would then "return" the business to him. However, while the directorship changed to his name the shareholding remained in his sister's name. Both YSB and Hui Ming say they were unaware the shares had not been transferred to YSB and say this is a result of a lack of understanding of company operations and of illiteracy in English on their part.

[8] In July 2001 YB came to New Zealand at the age of 18. By August 2001, the Companies Register recorded YB as being the sole director of B & Z, and by October he was the sole shareholder of B & Z. It seems the relevant company documents were signed only by him, except he says one of the signatures was forged. YB says that Hui Ming "gifted" B & Z to him when she emigrated to Australia. Hui Ming firmly denies having gifted the company's shares to YB.

[9] YSB says that he and YB went into business together at YB's suggestion, in about 2005, importing cars through B & Z. YSB says he provided the startup capital and general business experience. YB says he had learned about car importation apparently through working as a car groomer at a car dealership. On 13 May 2006, B & Z's bank account, which it seems had been closed, was reopened by YB.

[10] YSB says he sold his Great South Road property in about August 2006 for approximately \$330,000. He says the sale proceeds went into B & Z. No

documentation has been provided in support, but we note the sale appears to have coincided with the reopening of B & Z's bank account. There is no suggestion YB had the capital to fund the business operation, nor is there evidence of his having injected capital or otherwise funded B & Z at any point. We note that YB was only about 22 years old at the time the car importation business started up.

[11] YSB says he worked very long hours in B & Z from the outset until 2021. YB acknowledges that his father was involved in the business. He says however that his father only helped with "odd jobs" such as oil changes, vehicle tyre changes, vehicle maintenance, vehicle grooming, and office cleaning from 2009 to 2018. He does not however suggest his father was not working long hours.

[12] In 2010 B & Z bought an industrial/residential property in Galway Street, Onehunga for \$680,000 plus GST. YSB says this was by agreement between YB and himself. The property was to be and did operate as a garage base for the business and as a home for YSB and his family, including for YB.

[13] YSB says \$100,000 of the Galway Street purchase price came from him through YXZ's account and the balance from B & Z's retained funds, which included YSB's Great South Road sale proceeds. YSB produced bank accounts which show a \$100,000 transfer out of YXZ's account and into B & Z's account on 18 February 2010. This appears to have been the settlement date for the purchase. YB accepts this transfer happened but says it was a loan from YXZ which he repaid. He produced a heavily redacted bank statement recording a debit of \$50,000 to YSB on 14 June 2010 and another debit of \$50,000 to an unrecorded payee on the same day. YSB denies that his monies were a loan and denies they were repaid, but says that he has not been able to access bank records.

[14] YSB says in July 2011 he paid B & Z \$120,000 towards the purchase of a second garage. He says on 18 September 2012 he paid a further \$100,000 to B & Z. He says YB told him to pay the money into a bank account of KVB Kunlun (KVB), a global financial services company. There is some documentary evidence to prove the payments to KVB but no evidence of funds then being transmitted by KVB on to B & Z. YSB says these monies and the company's retained earnings were used to

purchase a property in Cartwright Road, Kelston for \$975,000 in March 2013. We take it this is the second garage he refers to but note that the settlement of the purchase occurred some time after the payments he made. YB denies that YSB made the alleged payments to B & Z or that he otherwise contributed funds towards Cartwright Road.

[15] YSB says that he transferred a further \$100,000 to B & Z on 13 August 2014, intended for and applied to setting up a branch outside Auckland. He produced an ASB withdrawal receipt showing a transfer from him to a B & Z cheque account and a deposit receipt from that account. It seems that the branch property was in Duke Street, Hamilton which was settled on 3 March 2017. YSB says Duke Street was otherwise funded by a loan from ASB and from B & Z's retained earnings. YB says the \$100,000 transfer to B & Z was a repayment by YSB of a loan made to him by B & Z on 19 and 20 October 2013 for purchase of a unit in China. He points to two payments made by B & Z to KVB totalling \$100,040, showing in another redacted bank statement and KVB's confirmation that the money had been transferred into Chinese yuan and paid into an unnamed bank account. There is no documentary evidence to link B & Z's 2013 payments to KVB, to YSB.

[16] YSB says in 2022 his lawyer told him that B & Z had settled the purchase of another property, this one in Wordsworth Street in Christchurch, on 26 April 2017. YSB does not appear to have been aware the property was purchased at the time, but says this was also a partnership acquisition. YSB says he did not lodge a caveat as he considered he had enough protection in the other three properties.⁵

[17] YSB also says he made other payments to B & Z: two of smaller amounts in 2006, and one of \$250,000 on 17 July 2017 to be used by B & Z to pay creditors. He shows a transfer from his account and deposit to B & Z on that later date. YB does not dispute the payment but says this also was a loan and it was repaid with interest in four tranches totalling \$262,500 over January and February 2018. He produces evidence of those payments from B & Z on 3 January, 20 January, and

⁵ We note that the 2023 financial statements for B & Z refer to two other properties, both in Nelson, as being assets of the company. The significance or status of those properties was not addressed in submissions or affidavit evidence before this Court.

14 February 2018. He says the final repayment of \$23,000 was in cash in February 2018.

[18] In about mid-2021, the relationship between YSB and YB deteriorated and in September 2022, YB told YSB he was putting Galway Street on the market. YSB and his family were still living there. YSB and his family ultimately moved out and we are told that the property is no longer for sale.

High Court judgment

[19] Following a carefully reasoned analysis, the Judge concluded that a partner does have an interest in partnership property that can support a caveat but that the caveated properties were not arguably partnership property.⁶ As a consequence, YSB's application that the caveats not lapse was dismissed and costs were ordered against him.⁷

[20] The Judge set out the relevant evidence, which we in turn have outlined above. Her assessment that YSB had no reasonably arguable case for a caveatable interest was based on the following:

- (a) YSB had not pointed to any clear evidence that there was a partnership arrangement. While the absence of formal documentation was not surprising given their familial relationship, it would be expected there would be communications between them by way of emails, text messages, or other business records pointing to a partnership relationship.⁸
- (b) YSB had not provided any evidence to show he received a share of the profits of the alleged partnership, despite his evidence that the business was successful, profitable, and growing. If there was a partnership arrangement he would have been receiving a share of the profits.⁹

⁶ Judgment under appeal, above n 1, at [41].

⁷ At [52]–[53].

⁸ At [42].

⁹ At [43].

- (c) While there is evidence to suggest B & Z was originally incorporated by YSB's sister for his retail business and used initially for that purpose, that does not on its own tend to prove that the company later became the corporate vehicle for a car importation partnership between YSB and his son.¹⁰
- (d) YSB's description of his own role in the business does not tend to suggest a financial partnership arrangement.¹¹
- (e) Leaving "the advances" to one side, YSB's case that there existed a partnership arrangement and that B & Z was the corporate vehicle for the partnership came down to bare assertion unsupported by any tangible evidence.¹²
- (f) There was also no evidence to suggest it was agreed that B & Z would acquire and hold the caveated properties on trust for the alleged partnership. This again is a bare assertion.¹³
- (g) In his originating application and written submissions, YSB proposed that B & Z held the properties on trust for him pursuant to an institutional constructive trust as an alternative to an express trust for the alleged partnership. But there is no evidence to support YSB's assertion that the properties were acquired using funds he advanced to B & Z.¹⁴
- (h) The "advances to B & Z" were the only possible fact tending to show a partnership arrangement. There is no evidence to show these advances were made pursuant to a partnership venture. YB provided evidence that points to some of them being loans to B & Z (the 2010 payment of \$100,000 and the 2017 payment of \$250,000) and that the 2014

¹⁰ At [44].

¹¹ At [45].

¹² At [46].

¹³ At [47].

¹⁴ At [48].

payment of \$100,000 was a repayment of a loan by B & Z. There is no evidence to corroborate the alleged advance of the unquantified net sale proceeds of the Great South Road property to B & Z and no evidence that the sums of \$120,000 and \$100,000 went to B & Z in 2011 and 2012.¹⁵

- (i) YSB's evidence of a cheque deposit of \$10,000 in 2006 is contradicted by the outcome of YB's trace request which showed it was a cash payment rather than a cheque payment.¹⁶

[21] The Judge concluded by saying that, while YSB is not required to prove his case on the balance of probabilities, he must point to evidence tending to prove the facts relied on to make out a reasonably arguable case. She found that the evidence did not meet this threshold.¹⁷

Application for leave to adduce further evidence

[22] On 22 April 2024, YSB filed an application for leave to adduce further evidence and an affidavit in support which annexed 473 pages of further documentation. These documents appear to be:

- (a) messages from an old phone of YSB's that had been recently repaired;
- (b) messages posted by YSB on WeChat for B & Z's "marketing purposes" from 2014 to 2017;
- (c) text messages between YSB, YB, and YB's wife regarding the sale of cars;
- (d) WeChat messages between YSB and the manager of B & Z regarding the sale of one car;

¹⁵ At [49].

¹⁶ At [49].

¹⁷ At [50].

- (e) a message to a concrete worker regarding the driveway for the West Auckland garage;
- (f) messages with suppliers;
- (g) photos of YSB working at the car importation business; and
- (h) various B & Z bank statements from 2007 until 2021.

[23] YSB sums up the relevance of these documents in his affidavit in support:

If I was not in a partnership with [YB], I would not have conversations with [YB] and his wife regarding the business, especially when it comes to pricing; I would not have posted WeChat moments to promote our business; I would not have worked after hours and sometimes till late night; I would not have had dealings with our manager and auto parts suppliers; and, I would not have had access to and kept all these original bank statements of B & Z received in my letterbox.

[24] While we accept that these documents are likely to be relevant and admissible in the substantive proceeding, the 22 April 2024 affidavit does not meet the test required to adduce fresh evidence and we dismiss the application for leave to do so.¹⁸

[25] First, the evidence is not fresh. It was reasonably available at the time of the caveat application but was not assembled until following the judgment. The invoice for repair of the phone is dated 17 February 2024. It seems therefore that the phone was not taken for repair until after the judgment. In proceedings of this nature, it is incumbent upon the applicant to put an arguable case forward at first instance, not belatedly on appeal, and especially not evidence of this magnitude.

[26] In any event, because of the conclusion we reach below, we do not consider the evidence to be cogent in the context of the caveat application. It does not go sufficiently to the issue of whether there was a partnership between YSB and YB in terms of ownership of the assets held by B & Z, nor to the alternative constructive trust argument, and it is on that basis that we find against the appellant.

¹⁸ *Erceg v Balenia Ltd* [2008] NZCA 535 at [15].

[27] Mr St John, for the respondent, says it is also relevant that after being served with the application for leave, B & Z asked for YSB's phone to be delivered to a forensics expert and received no cooperation from YSB. However, we asked to see the correspondence referred to in that regard and note that the letter from YB's solicitor to YSB's then-solicitor, dated 30 April 2024, refers to the information stored on YSB's phone being obviously relevant to the issues in the *substantive* proceeding and that it should therefore be produced for inspection and cloning. The next reference to the phone, at least in terms of the material handed up to us, was in a document labelled "Tailored Discovery Orders Response from Plaintiff" dated 16 September 2024 filed by YSB in person after he had ceased instructing his solicitor. In that document, YSB says that he has concerns about the risks of loss or damage to the phone in a disclosure but would be willing fully to comply in a manner of disclosure that is overseen by the Court.

[28] We do not consider in those circumstances that YSB's non-provision of the phone for purposes of the caveat proceeding is material to the application for leave.

Analysis

[29] We agree with the Judge's finding that YSB has not met the burden of establishing an arguable case that he and YB operated a partnership that owned the assets of B & Z, or that YSB had an interest in the properties by way of constructive trust. We say that because, as the Judge held, there is no evidence, other than assertion, that B & Z acquired the caveated properties, or other assets, on trust for the father and son, or that YSB had a reasonable expectation of an interest in the assets of the company. There are no documents that suggest the company was not the true owner of its assets.

[30] To the contrary, YSB obviously knew of the formation of the company, thought he was the owner of it, and knew that the business was being run through it and properties acquired by it. The payments he says he made were all to the company. The company must be taken to be the owner of its assets, not YSB or YB. This is not a situation where the corporate veil can be lifted. A shareholder (whomever they may

be found to be in this instance) does not have a caveatable interest in land owned by the company.¹⁹

[31] For those reasons we agree with the Judge that the application to sustain the caveats must be dismissed.

[32] That is not to say, in terms of the substantive proceedings between the parties, that YSB does not have an arguable claim to an interest in the company itself. This would require a recasting of the statement of claim. We take a somewhat different view to that of the Judge to the evidence provided on the caveat application as to the contributions and possible expectations of YSB and YB regarding B & Z. We note that, whatever the position may be with the payments made by YSB to B & Z, there is evidence of a number of substantial payments made by him into the company's bank account. And although the actual contribution of the proceeds of sale of YSB's Great South Road property is not yet supported by documentary evidence, the sale date appears to coincide with the reopening of B & Z's bank account by YB in May 2006, and the commencement of the car importation business.

[33] While YB says the business was solely his, there is no evidence of capital payments being made by him. He was not required to provide such evidence, the burden of the application being on his father, but it might have been expected he would provide that evidence if it existed. YB was also only some 22 years of age when the business began, and his father clearly had business experience and capital. They lived together in the first property purchased by B & Z for some years and clearly had a close living and working relationship. It is not denied that YSB worked for B & Z for a very long time, or that he worked very long hours.

[34] While the Judge obviously thought it significant that there was no evidence of profit share being paid to YSB, Mr St John acknowledged there was no evidence of any profit share being paid to YB either, except an increase of some \$130,000 in YB's current account in the year to March 2023. In fact, retained earnings at March 2023

¹⁹ *Mahon v Station at Waitiri Ltd* [2017] NZCA 387, (2017) 18 NZCPR 760 at [33]–[37], citing *Macaura v Northern Assurance Co Ltd* [1925] AC 619 (HL) at 625–626 and 630; and *Ten Pin Properties Ltd v Bowlarama (NZ) Ltd* HC Christchurch M655/89, 18 December 1989 at 2–3.

were over \$3 million which suggests little had been distributed, at least on the face of the only financial statements in evidence. Mr St John acknowledged that wages had also not been paid to YSB, at least through the accounts. They may have been paid in cash. We do not know the position regarding payment of wages to YB but it would seem likely that also does not feature on the face of the accounts. The point is that, in a case of this nature, a court cannot too readily draw inferences from the records, or lack of them.

[35] These are all matters that will need to be addressed in the substantive proceedings if the parties are not able to resolve this dispute. We note that, absent a settlement, those proceedings are likely to prove very expensive and may not conclude in the High Court. YSB will be materially disadvantaged if he does not have legal representation in a matter of this nature.

[36] Given our finding, we do not need to address the matter of the Court's residual discretion to remove caveats even where the caveator has shown a reasonably arguable case. We note Mr St John's advice that YB is prepared to undertake to deal with the company's assets only in the ordinary course of business and expect that, in those circumstances, no alternative interlocutory action will be required on the part of YSB pending the outcome of the substantive proceeding.

Costs

[37] The respondent is entitled to costs for a standard appeal on a band A basis plus reasonable disbursements. We certify for second counsel, given the difficulty of much of the case being conducted in two languages, and we allow .5 costs for the respondent's role in preparing the case on appeal.²⁰

Result

[38] The application for leave to adduce further evidence is declined.

[39] The appeal is dismissed.

²⁰ Court of Appeal (Civil) Rules 2005, sch 2.

[40] Costs are awarded to the respondent for a standard appeal on a band A basis and usual disbursements. We certify for second counsel and allow .5 costs for the respondent's role in preparing the case on appeal.

Solicitors:
Heritage Law, Auckland for Respondent